IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-159

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NORMAN NEW RIDER, a minor, by his mother and next friend, WILMA WILLIAMS; LLOYD CUMMINGS, JR., a minor, by his parents and next friends, LLOYD and LILLIE CUMMINGS; KENNETH SMITH, a minor, by his mother and next friend, VELMA SMITH,

Petitioners,

v.

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT No. 1, Pawnee County, Oklahoma, whose members are ALBERT ALLEY, President, H. L. RATLIFF, FRANK MALTSBERGER, DONALD WATERS, R. L. WOODARD; H. L. HOLLOWAY, as Superintendent of Pawnee School District; JAMES CHILDERS, as Principal of Pawnee Union High School,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR REHEARING

Petitioners hereby request this Court for an order (1) granting rehearing of this Court's order, dated December 10, 1973, denying the Petition for Writ of Certiorari, (2) vacating the order of denial, dated December 10, 1973, and (3) granting the Petition for Writ of Certiorari.

This petition is based upon the ground that it serves to clarify the issues briefed on certiorari and that the issues, as clarified, warrant the granting of certiorari. This Court has recognized that clarification of the original arguments is a proper ground for granting rehearing pursuant to Rule 58(2), RULES OF SUPREME COURT. *See, e.g., Hickman* v. *Taylor,* 328 U.S. 876 (1946), 329 U.S. 495 (1947); *Brinkerhoff-Faris Trust Company* v. *Hill,* 280 U.S. 550 (1930), 281 U.S. 673 (1930).[1] The ground for rehearing and granting of certiorari is that this is an appropriate case for the Court to recognize an implied constitutional right to cultural integrity. A discussion follows.

The briefs in this case, however inadvertently, cast this case as a so-called "long hair" case. The essence of this case, however, is Indian culture, not long hair. It happens that this case involves the traditional Pawnee hairstyle, but this case could easily have arisen in the context of a regulation prohibiting the retention of other equally harmless cultural characteristics, such as language, moccasins, beadwork, squashblossom necklaces, shell belts, or any of the other traditional symbols of the American Indian culture and race.

The cultural, racial, and religious issues involved in this case are difficult to compartmentalize. A large part of this problem is due to the fact that Indian culture and religion existed in this country long before now-magic legal phrases such as "freedom of religion," "equal protection," and "symbolic speech." Because of linguistic and cultural differences, such phrases do

[1] The orders granting rehearings in these cases did not specify the grounds for relief, but the petitions for rehearing in both cases were based upon clarification of the arguments. *See* R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 526 (4th ed. 1969).

not always fit perfectly the mores of the literally foreign culture of the American Indian. The issues here, then, are not purely speech, religion, or race—each taken in a vacuum—but rather a mix of all three, plus the fourteenth amendment guarantee of liberty. The issue should have been cast in terms of whether the Constitution protects specific traits of the culture of the American Indian, when the expression of those traits has caused no demonstrable harm. Although it seems so instinctively plain that the Constitution does afford such protection, we recognize that no specific line of cases is directly in point.

The Court can resolve these conceptual problems by recognizing a constitutional right to cultural integrity.

The right to cultural integrity flows naturally from this Court's past decisions and is particularly timely today. As Justice Douglas emphasized in his dissenting opinion in this case, this Court has often held that constitutional requirements of equality do not permit schools "to submerge the individual," *Meyer* v. *Nebraska,* 262 U.S. 390, 402 (1923), or "to foster a homogeneous people." *Tinker* v. *Des Moines Independent School District,* 393 U.S. 503, 511 (1969). The lessons of these cases conflict with the broad outlines of *Brown* v. *Board of Education,* 347 U.S. 481 (1954), and the cases following it, if *Brown* is read as requiring a forced "melting pot" or assimilation. This was, we emphasize, precisely the meaning which the Tenth Circuit gave to *Brown* in the decision below. (Petition page 21, Appendix F at 15a.) The tension between the *Meyer-Tinker* and *Brown* lines of authority can be resolved by recognizing a right to cultural integrity. This Court could fashion a test, when such a right is claimed, requiring the claimant to show (1) the

existence of a cohesive, well-defined culture, *cf. Yoder* v. *Wisconsin,* 406 U.S. 205, 215-18 (1972), and (2) that the conduct in question is a specific characteristic of the culture. The entity seeking to infringe upon the right would then have to justify its conduct by showing either a rational basis or a compelling state interest. Such a test would protect important interests such as those involved here, while at the same time limiting the circumstances under which the right could be invoked. The application of such a test to the facts of this case would result in a reversal of the decision of the Tenth Circuit Court of Appeals.

The right suggested here is similar in concept to other implied rights and powers which this Court has often recognized in the past. An intriguingly similar case is *Kent* v. *Dulles,* 357 U.S. 116 (1958), where this Court concluded that the "liberty" guarantee of the fifth amendment included a "right to travel": "where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them." 357 U.S. at 129. A "freedom of association" results from the free speech and assembly guarantees of the first amendment. *NAACP* v. *Alabama,* 357 U.S. 449 (1958). The "right to privacy" results from the guarantees of the first, third, fourth, fifth, and ninth amendments. *Griswold* v. *Connecticut,* 381 U.S. 479 (1965).[2] The right

[2] This Court has found implied powers as well as implied rights. The judiciary's power of judicial review was implied from the Constitution in *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137 (1803). Congress' power over Indian affairs is now recognized as deriving from the treaty-making power and the commerce clause. *McClanahan* v. *Arizona,* 411 U.S. 164, fn. 7 (1973). *Cf. McCulloch* v. *Maryland,* 17 U.S. (4 Wheat.) 316 (1819).

to cultural integrity flows easily from the first amendment guarantee of freedom of expression and, particularly, from the fifth and fourteenth amendment guarantees of "liberty." The case for such a right is even stronger for American Indians because race and religion are also involved, thus invoking the relevant provisions of the first and fourteenth amendments.

The issue, as phrased in this petition, is in the front line of important matters before this Court. The recognition of a right to cultural integrity will clarify the balance between the right to equal opportunity, as set forth in *Brown* and related cases, and the right to be free of force, unreasonable, and unnecessary assimilation. This case is of great importance to the civil liberties of American Indians, as is shown by the participation of the several amici in the Court of Appeals. Significantly, the United States of America considered this case to be important enough to participate as a vigorous amicus below, although the United States adhered to its practice of not participating on certiorari in cases in which the United States is not a party. In light of a disturbing rash of expulsions of American Indian students all across the country for reasons similar to those raised in this case, we are confident that many other American Indian and civil liberties organizations will seek to participate as amici if this Court decides to hear this case on the merits. The profound impact of these issues on American Indians will be even more apparent then.

In conclusion, the right to cultural integrity suggested here would serve to eliminate one of the greatest sources of inequity and tension in this country. This nation is founded upon the principle of minority rights, as well as upon the principle of majority rule. The balance between the two concepts is a delicate one, and

the court below upset the balance by applying only the notion of majority rule. We recognize and respect the strictures which this Court places upon the granting of petitions for rehearing; nevertheless, such strictures should be outweighed here by the harmless desire of three young boys to practice the long-standing traditions of an old and proud culture. These many forces would be fully and fairly reconciled by this Court's recognition of a right to cultural integrity—a constitutional right which, though implied, is a principle easily derived from our Constitution, which has always been read in a manner to recognize the rights of American Indians, who so often have no ultimate recourse other than to this Court.

Respectfully submitted,

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January, 1974

Certificate of Counsel

As one of the attorneys for the petitioners, I hereby certify that this petition for rehearing is presented in good faith and not for delay, and that this petition is restricted to the grounds specified in Rule 58(2), RULES OF SUPREME COURT.

/s/
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